

ESTATE OF FRANK TOOAHIMPAH

IBIA 85-22

Decided August 10, 1987

Appeal from an order denying reopening issued by Administrative Law Judge Sam E. Taylor in Indian Probate No. H-34-67, H-33-71, IP OK 1 P 85.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Indian Probate: Appeal: Generally

The fact that an Indian probate appeal is pending before the Board of Indian Appeals does not give the Board jurisdiction over an allegedly related Bureau of Indian Affairs decision which has no effect on the decision on appeal.

2. Indian Probate: Inheriting: Generally--Indian Probate: Wills: Generally

Where an Indian will creates life estates in decedent's children, with remainders to the life tenants' "heirs of the body," the life tenants' heirs cannot be determined until the life tenants die.

APPEARANCES: Patricia L. Brown, Esq., Washington, D.C., for appellants.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE VOGT

Appellants Esther Brace, Lois Pahdopony, and Hattie Ware seek review of a December 20, 1984, order issued by Administrative Law Judge Sam E. Taylor, denying reopening in the estate of Frank Tooahimpah (decedent). For the reasons discussed below, the Board affirms that order.

Background

Decedent, Comanche Allottee No. 146, died on July 15, 1966, at the approximate age of 86. By order dated February 20, 1967, Examiner of Inheritance Kent R. Blaine approved decedent's will, in which decedent devised life estates to each of his seven children, including appellants, in separate portions of his trust property. The will provided that, upon

the death of each life tenant, the remainder interest in that portion of decedent's property would vest in the "heirs of the body" of the life tenant. Examiner Blaine concluded that it was not possible at that time to determine the identities of the remaindermen.

On February 5, 1971, following the death of James Tooahimpah, one of decedent's sons, Hearing Examiner John F. Curran issued a supplemental order in decedent's estate, holding that the remainder interest in the property in which James held a life estate vested in his four children, who were the heirs of his body.

In 1977, oil and gas leases were executed for the property in which appellants hold life estates. Production began in 1982. Since then, the Anadarko Agency, Bureau of Indian Affairs (Agency, BIA), has deposited the royalties from this production into an IIM account, and paid the interest on the account to appellants.

In August 1983, appellants, through their attorney, requested the Agency Superintendent (Superintendent) to distribute to them one-half of the royalties from the property in which they hold life estates. The request was accompanied by agreements signed by each of appellants' children, consenting to the distribution to appellants.

On September 16, 1983, the Superintendent denied the request on the grounds that the proceeds could not be distributed to life tenants unless the remaindermen consented, and the remaindermen in this case, the heirs of the bodies of appellants, could not be determined until appellants died.

Appellants appealed to the Anadarko Area Director (Area Director), who, in September 1984, requested Judge Taylor to determine, if possible, the identity of the remaindermen of appellants' life estates. The Area Director's memorandum to Judge Taylor stated that he believed the consent agreements executed by appellants' children should be approved and implemented, provided the identity of the remaindermen could be determined by the Administrative Law Judge.

Judge Taylor treated the Area Director's request as a petition to reopen decedent's estate. He denied the petition by order dated December 20,

1/ The Agency apparently follows the common law rule under which a life tenant is not entitled to royalties, but only to the income from royalties, unless the life tenant and remaindermen have executed an agreement for the division of rents and royalties. See Parker v. Riley, 250 U.S. 66 (1919); Welborn v. Tidewater Associated Oil Company, 217 F.2d 509 (10th Cir. 1954); Barnes v. Keys, 36 Okla. 6, 127 P. 261 (1912).

25 CFR 212.9(b), concerning mining leases of undivided inherited lands, provides: "If the heirs include a life tenant, the lease must be accompanied by an agreement between such life tenant and the remaindermen, providing for the division of the rents and royalties subject to approval of the Commissioner of Indian Affairs or his authorized representative."

1984, on the grounds that the heirs of the bodies of appellants could not be determined during their lifetimes.

Appellants filed a notice of appeal from Judge Taylor's order, which was received by the Board on February 15, 1985. In their notice of appeal, appellants requested a stay of proceedings pending the filing of a rulemaking petition by tribes in the Anadarko area, seeking a rule which would allow distribution of royalties to life tenants in cases where the remaindermen are contingent. By order of February 21, 1985, the Board stayed proceedings in this appeal.

By order of November 19, 1986, the Board reopened proceedings at the request of appellants.

In their brief on appeal, appellants stated that they "ask the Board to review and reverse the decision of the Bureau of Indian Affairs, which denies appellants any of the proceeds of oil and gas produced from trust lands in which appellants have a life tenancy" (Appellants' Brief at 1). Appellants' brief discusses various proceedings in the BIA concerning their attempt to have royalties distributed to them. It does not, however, address the holding in Judge Taylor's December 20, 1984, order, from which their notice of appeal was filed.

On April 3, 1987, the Board ordered appellants to clarify their appeal by informing the Board whether, as it appeared from their brief, they intended to file an administrative appeal from a decision of the BIA, rather than an appeal from Judge Taylor's order. If that was their intent, they were requested to identify the decision appealed from, furnish the Board with a copy of the decision, and discuss how the Board would have jurisdiction over the appeal.

Appellants state in their response that they are appealing a BIA decision (although they do not explicitly identify the decision) and that the Board has jurisdiction pursuant to 25 CFR 2.3. 2/ They attach a copy of a July 31, 1986, letter signed by the Acting Deputy to the Assistant Secretary--Indian Affairs (Trust and Economic Development), which they describe as a decision denying the rulemaking petition filed by 12 Anadarko area tribes. 3/

They also suggest that they may be attempting to appeal a failure of the Area Director to decide their appeal from the September 16, 1983, decision of the Superintendent denying appellants' request to have royalties

2/ With reference to appeals to the Board, 25 CFR 2.3(a) provides: "As prescribed in § 2.19(b) of this part, further appeals from the decisions of the [BIA official exercising the administrative review function of the] Commissioner of Indian Affairs may then be made to the Board of Indian Appeals."

3/ The letter states that BIA plans to issue regulations on the subject of life estates and future interests. Evidently, appellants do not expect the planned regulations to address their concerns.

distributed to them. They request that, if the Board considers jurisdiction to be with the Area Director, it direct him to decide the appeal within 30 days.

Discussion and Conclusions

[1] Since the decision appealed from is Judge Taylor's December 20, 1984, order denying reopening in decedent's estate, the Board must consider whether it has jurisdiction over any of the BIA administrative decisions cited by appellants.

Assuming arguendo that the July 31, 1986, letter was a BIA decision that appellants could have appealed to the Board, they did not file a notice of appeal from that letter as required by 43 CFR 4.332(a). The fact that appellant's probate appeal was pending before the Board at the time the letter was issued does not give the Board jurisdiction over the BIA letter, which in no way affected the probate order on appeal.

Therefore, the Board lacks jurisdiction over this matter insofar as it is an attempt to appeal the July 31, 1986, letter of the Acting Deputy to the Assistant Secretary (Trust and Economic Development).

The Board also lacks jurisdiction over this matter insofar as it may be an attempt to appeal a failure of the Area Director to decide appellants' appeal from the Superintendent's September 16, 1983, decision. Although 25 CFR 2.19(b) provides that the Board acquires jurisdiction over an appeal which has been pending before the BIA official exercising the administrative review authority of the Commissioner of Indian Affairs for more than 30 days after it is ripe for decision, there is no corresponding provision concerning appeals pending before Area Directors.

Therefore, the Board lacks jurisdiction over any administrative decision of a BIA official in this matter. The only decision properly before the Board is Judge Taylor's December 20, 1984, order denying reopening.

[2] Appellants do not contend that Judge Taylor erred in concluding that appellants' heirs of the body cannot be determined while appellants are still living. Appellants can have no actual heirs until they die. Any or all of the persons who are now the apparent heirs of appellants may die before appellants. It is possible that appellants' actual heirs will be entirely different people than those who now appear to be their heirs. Judge Taylor's holding is therefore correct.

4/ Even if appellants' Nov. 11, 1986, request to reopen proceedings before the Board could be construed as a notice of appeal from the July 31 letter, it would be untimely. 43 CFR 4.332(a) provides that an appeal must be filed within 60 days after receipt by appellant of the decision from which the appeal is taken.

5/ The Board therefore also lacks jurisdiction to order the Area Director to decide appellants' appeal from the Superintendent's Sept. 16, 1983, decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 20, 1984, order of Administrative Law Judge San E. Taylor denying reopening of this estate is affirmed.

Anita Vogt
Acting Chief Administrative Judge

I concur:

Kathryn A. Lynn
Administrative Judge